CASE NO. 86-1620

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

SMOKY GREENHAW COTTON COMPANY, INC., and JOHN C. GREENHAW,
Petitioners

v.

MERRILL LYNCH, PIERCE, FENNER & SMITH, INC., CHARLES DENNIS SCOTT, and MARGARET SCOTT,
Respondents

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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To The Honorable Chief Justice And Associate Justices Of The Supreme Court Of The United States:

Merrill Lynch, Pierce, Fenner & Smith, Inc., Charles Dennis Scott, and Margaret Scott, Respondents, respectfully submit this their Brief in Opposition to the Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit previously filed herein by Smoky Greenhaw Cotton Company, Inc. and John C. Greenhaw.

REASONS FOR DENYING THE WRIT

I.

THE QUESTION WHETHER RICO CLAIMS ARE ARBITRABLE IS ALREADY BEFORE THIS COURT IN *SHEARSON/AMERICAN EXPRESS, INC. v. McMAHON*

With respect to the first question presented by the Petition for Certiorari, i.e., whether a plaintiff may be forced to arbitrate causes of action under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961, *et seq.* (1982) ("RICO"), this Court has pending before it the case of *Shearson/American Express, Inc. v. McMahon,* No. 86-44, which was orally argued on March 3, 1987. *McMahon* presents the same issue presented by Petitioners. Because the issue presented will be resolved in *McMahon,* Respondents respectfully submit that it is unnecessary for this Court to grant certiorari in this case on that issue.

Because Petitioners have not addressed the merits of the legal issue involved and have limited their comments to policy issues, Respondents will likewise not address the legal arguments supporting arbitrability of RICO claims. Nevertheless, Respondents feel obliged to respond to the attack on the arbitration system made by Petitioners.

Petitioners' primary argument is that under the rules of the New York Stock Exchange, Petitioners' claims would be resolved by "insiders in the securities industry" who would be "prejudiced at best." Although it is true that New York Stock Exchange arbitration panels typically include individuals employed in the securities industry,

it is required by the arbitration rules of the New York Stock Exchange that three of the five arbitrators be individuals from outside of the industry. Furthermore, the presence of persons with security industry experience on the arbitration panels is desirable inasmuch as such individuals are knowledgeable about the trading conduct complained of by Petitioners. Petitioners' contention that such individuals are inherently biased and that Petitioners will be unable to obtain a fair hearing in arbitration is argument, not fact.

Petitioners suggest that arbitration is not a desirable forum for assertion of their claims. Petitioners desire to have the extensive mechanisms for discovery under the Federal Rules of Civil Procedure for use in the prosecution of their RICO claims. However, it is the simplicity of arbitration which was bargained for by the parties. As often recognized by this Court, there is a strong federal policy in favor of enforcing agreements to arbitrate claims, thereby avoiding the expense and delays which are inherent in our court system. *See Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24 (1983).

II.

THE NON-RETROACTIVITY DOCTRINE ENUNCIATED IN *CHEVRON OIL CO. v. HUSON* IS INAPPLICABLE TO PETITIONERS' RICO CLAIMS

Petitioners suggest that even if RICO claims are arbitrable, this Court's decision in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971) requires a holding that Petitioners' RICO claims nevertheless are non-arbitrable. Petitioners argue in effect that this Court's decision in *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213 (1985), should

not be applied to Petitioners' RICO claims retroactively, and that those claims are accordingly non-arbitrable under the old "intertwining doctrine."

Petitioners' contentions should be rejected for two reasons. First, even if *Byrd* is not to be retroactively applied, the "intertwining doctrine" as previously applied by the Fifth Circuit would not require a jury trial of Petitioners' RICO claims. All claims asserted by Petitioners, with the exception of the RICO claims, were resolved in *Smoky Greenhaw Cotton Co., Inc. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 785 F.2d 1274 (5th Cir. 1986) ("Greenhaw II"), including all claims under Rule 10b-5. The RICO claims were remanded to the district court. Because Petitioners' RICO claims are not joined with any non-arbitrable federal securities law claims, the intertwining doctrine would not prevent arbitration of Petitioners' RICO claims.

Second, the Fifth Circuit correctly held that *Huson* does not require non-retroactive application of *Byrd* to Petitioners' RICO claims. Although this Court in *Huson* identified three factors to be considered in dealing with the non-retroactivity question, the controlling factor for resolution of the question in this case is the third factor identified in *Huson*. This Court in *Huson* described that third factor by quoting a statement from *Cipriano v. City of Houma*, 395 U.S. 701 (1969), wherein it was stated, "Where a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of non-retroactivity." 404 U.S. at 107.

Petitioners suggest that substantial inequitable results and injustice and hardship would result to Petitioners if forced to arbitrate their RICO claims because those claims have "already been tried to a jury." However, those claims have never been resolved. The trial court, at the first trial of this case (which was held prior to this Court's decision in *Byrd*), directed a verdict in favor of Respondents on Petitioners' RICO claims. The Court of Appeals determined that there was sufficient evidence to go to the jury on the RICO claims, and remanded those claims to the district court. The RICO claims have never been tried to a verdict, and resolution of those claims outside of arbitration would require a new trial in district court. Accordingly, the only "hardship" suffered by Petitioners is that Petitioners will be forced to arbitrate rather than litigate their RICO claims. However, that is precisely what Petitioners bargained for in agreeing to arbitration of their disputes with Respondents. In short, no substantial inequitable results and no injustice or hardship would occur if Petitioners are compelled to arbitrate their RICO claims. Therefore, the Court of Appeals' decision is not in conflict with *Huson*.

III.

A FELONY INDICTMENT OF A RICO DEFENDANT DOES NOT AFFECT THE ARBITRABILITY OF A CIVIL RICO CLAIM

Petitioners apparently argue that if this Court determines that RICO claims are arbitrable in *McMahon*, that that decision should not apply where a RICO defendant has been indicted on one of the predicate offenses alleged in the RICO claim.

Petitioners cite no authority for such a distinction, but merely argue that the existence of an indictment somehow changes the policy concerns involved. Respondents respectfully submit that the policy concerns are the same, regardless of whether a grand jury has indicted the RICO defendant. The civil RICO provisions are designed to deter criminal conduct, and are completely independent of the criminal processes which might be available to a prosecutor. The existence of both a civil RICO action and an indictment of the RICO defendant means only that the defendant is being pursued in both the civil and criminal forums. The existence of the indictment in no way impacts on the purposes behind or the prosecution of the civil RICO case. As noted in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, ____U.S.____, 105 S. Ct. 3346, 3358-60 (1985), in the context of a civil antitrust claim, the remedial and deterrent purposes of the civil remedies in the federal statute are adequately preserved by pursuit of such claims in arbitration. This rationale applies to civil RICO claims regardless of whether the RICO defendant has been indicted for a predicate offense. There simply is no rational basis for a distinction between RICO cases where a RICO defendant has been indicted and those where a RICO defendant has not been indicted in resolving the arbitrability issue.

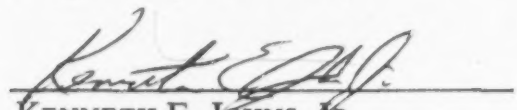
CONCLUSION

For the foregoing reasons, Respondents respectfully request that this Court deny the Petition for Writ of

Certiorari filed by Smoky Greenhaw Cotton Company, Inc. and John C. Greenhaw.

Dated: May 7, 1987.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that all parties required to be served have been served as follows. Three copies of the above and foregoing Brief in Opposition to Petition for Writ of Certiorari was mailed by depositing in a United States Post Office, first class mail, postage prepaid, return receipt requested, addressed to the attorney for Petitioners, Mr. David Greenhaw, P. O. Box 831, Odessa, Texas 79760, on this the 7th day of May, 1987.

KENNETH E. JOHNS, JR.